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No. 71-225

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM KIRALY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1971. On August 13, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether knowledge of a federal agent's status is an element of the offense under 18 U.S.C. 111.

2. Whether evidence of a prior felony conviction

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may be admitted against a defendant after he takes the stand.

3. Whether failure to transcribe the grand jury proceedings was error.

4. Whether the trial judge should have instructed the jury that the agents could not have been involved in their official duties if they were trespassing.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of assaulting two F.B.I. agents with a deadly weapon in violation of 18 U.S.C. 111. He was sentenced to a suspended three-year prison term and placed on five years' probation. The court of appeals affirmed *per curiam* (Pet. 24–25).

The facts adduced at trial showed that on October 1, 1968, two F.B.I. agents went to petitioner's house in connection with an investigation of one George Wells (Tr. 37, 172). They knocked on the side door and when petitioner's wife answered they introduced themselves to her as F.B.I. agents, showing her their credentials, and asked if her husband was home (Tr. 40, 174). She invited them in and informed them that her husband was inside (Tr. 40, 175). She then told petitioner that some F.B.I. agents were there to see him, and they introduced themselves and showed their credentials (Tr. 41–42, 175-176, 395, 465). In addition, one of the agents advised petitioner of his constitutional rights (Tr. 42, 178–179). When the agents attempted to interview petitioner he became angry and told them that the interview was over (Tr. 182). As

the agents closed up their brief cases and headed toward the door through which they had entered, petitioner said "I'll get something to get you the hell out of here" (Tr. 44, 183). He then went to a cabinet and pulled out a pistol (Tr. 46, 185). One of the agents quickly drew his gun and told petitioner to "drop that gun" which he did (Tr. 186). Inspection of the gun showed it was loaded and in firing condition (Tr. 194–196).

ARGUMENT

1. Petitioner contends that proof of knowledge that the person assaulted is a federal officer is a necessary element of a conviction under 18 U.S.C. 111. Although, as petitioner points out, there are some old cases taking this view, *e.g., Hargett* v. *United States,* 183 F. 2d 859 (C.A. 5), it is now well settled that such knowledge is not an element of the offense. *E.g., United States* v. *Marcello,* 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959; *United States* v. *Kartman,* 417 F. 2d 893 (C.A. 9); *United States* v. *Wallace,* 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Montanaro,* 362 F. 2d 527 (C.A. 2), certiorari denied, 385 U.S. 920.

In any event, the evidence here was ample that petitioner well knew the identity of the agents since they had introduced themselves and interviewed him for some time before he drew the gun (Tr. 41–42, 175–176, 395, 465).

2. Petitioner contends that the trial judge's ruling that his prior felony convictions could be used against

him if he took the stand was error.[1] It is well settled that such convictions are admissible for impeachment. *United States* v. *Sanders*, 412 F. 2d 854 (C.A. 5); *Nutter* v. *United States*, 412 F. 2d 178 (C.A. 9), certiorari denied, 397 U.S. 927; *United States* v. *Cacchillo*, 416 F. 2d 231 (C.A. 2); *United States* v. *Menk*, 406 F. 2d 124 (C.A. 7), certiorari denied, 395 U.S. 946; *Montgomery* v. *United States*, 403 F. 2d 605 (C.A. 8), certiorari denied, 396 U.S. 859. The fact that the convictions occurred thirty years ago, which was brought to the jury's attention (Tr. 381), did not render them inadmissible. *United States* v. *Palumbo*, 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947. We note, moreover, that the government never mentioned these convictions other than to correct petitioner's misstatement of the offenses of which he had been convicted (Tr. 443–444).

3. Petitioner's contention that the government erred in not transcribing the grand jury proceedings is without merit. The Federal Rules of Criminal Procedure do not require the recording of grand jury proceedings and no court has held that recording is constitutionally required. See *United States* v. *Kind*, 433 F. 2d. 339 (C.A. 4); *Baker* v. *United States*, 412 F. 2d 1069, 1073 (C.A. 5), certiorari denied, 396 U.S. 1018; *Loux* v. *United States*, 389 F. 2d 911, 916 (C.A. 9), certiorari denied, 393 U.S. 867.

Furthermore petitioner made no showing of any particularized need for the grand jury testimony of

[1] Petitioner took the stand and these convictions (for breaking and entering and armed robbery) were brought out on direct examination (Tr. 381, 443–444).

the F.B.I. agents who had made previous Jencks Act statements which were furnished to petitioner's counsel and used by him at trial (Tr. 201).

4. Petitioner contends that if the agents were trespassing at the time of the offense then they were not engaged in their official duties within the terms of the statute. Since the agents were invited into the house (Tr. 40, 175) and were in the act of leaving after an official interview (Tr. 43–44, 182–183, 404–405), the trespassing issue is not presented. In any event, the fact that agents may be acting in violation of the law does not establish that they are not in performance of their official duties. See *United States* v. *Sterling*, 369 F. 2d 799 (C.A. 3); *Hodgdon* v. *United States*, 365 F. 2d 679 (C.A. 8), certiorari denied, 385 U.S. 1029; *Hall* v. *United States*, 222 F. 2d 107 (C.A. 4); *Arwood* v. *United States*, 134 F. 2d 1007 (C.A. 6), certiorari denied, 319 U.S. 776.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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